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No. 203

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

WILLIAM JOSEPH BREAULT and
BONNIE JO ELLEN KATHRYN BREAULT,
Petitioners,

vs.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and Executors and Trustees under the Last Will and Testament of KATHRYN M. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Executor of the Last Will and Testament of OSCAR J. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Trustee and EUGENE A. BUSCH, Successor Trustee under the Last Will and Testament of OSCAR J. BREAULT, deceased; IRMA MEYERS, LITTLE SISTERS OF THE POOR OF CHICAGO, ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS, POLISH MANUAL TRAINING SCHOOL FOR BOYS, ESTELLE ANGELA BREAULT, KENNETH BREAULT and WESLEY MEMORIAL HOSPITAL, a Corporation,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

Respondents Feigenholtz, et al, who claim no beneficial interest in the controversy, would lead this Court into

the same misinterpretation of *Altemeier* v. *Harris,* 403 Ill. 345, into which they led the courts below.

Altemeier did not distinguish *Wolf* v. *Uhlemann,* 325 Ill. 165, in the manner which Respondents' Brief in Opposition represents to this Court. (Respondents' Brief in Opposition, pp. 5, 7).

In the first quotation from *Altemeier* on p. 5 of Respondents' Brief in Opposition the words "no trust existed" are omitted from the first sentence. These omitted words and the next sentence of the paragraph which is also omitted show that the first sentence of the paragraph which the Court of Appeals also partially quoted, referred not to *Wolf* but to five other cases in which no trusts were involved. (Petition for Writ of Certiorari, p. 16 *Altemeier* v. *Harris,* 403 Ill. 345, 351)

Respondents' Brief In Opposition by misplacement of the periods in the next two sentences quoted in the same paragraph seeks to convey the impression which later becomes assertion (Respondents' Brief In Opposition, p. 7) that *Altemeier* distinguished *Wolf* on the ground that in *Wolf* no spendthrift trust was involved.

The same tactic succeeded in the Court of Appeals. In their brief in that Court, respondents asserted *"Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, strongly relied upon by plaintiffs, was distinguished by the State Supreme Court in *Altemeier* v. *Harris,* 403 Ill. 345, 351, 86 N.E. 2d 229, on the grounds that *Wolf* involved only a trust for accumulation and not a spendthrift trust and 'there was no discussion of the power to terminate a spendthrift trust.'" Respondents' brief in the Court of Appeals also asserted "the Appellate Court said at p. 138, that *Wolf* did not involve a spendthrift trust * * *." (Appellees' brief in the United States Court of Appeals, pp. 21-22).

Nowhere in the Appellate Court opinion (335 Ill. App. 130) does such a statement appear.

Respondents' Brief in Opposition and the Court of Appeals' opinion are silent with respect to the real distinction between *Wolf* and *Altemeier*: In *Wolf* there was threatened litigation over the validity of an instrument which only if valid would have created a spendthrift trust. In *Altemeier* there was a pretended controversy over an active subsisting spendthrift trust validated and construed many years before. *Altemeier* v. *Harris,* 403 Ill. 345, 356-357. James, *Illinois Probate Law and Practice,* 1951, Section 11.17, p. 101; Bogert, *Trusts and Trustees,* 2nd Ed. 1962, Section 1,009, p. 571; and See: Griswold, *Spendthrift Trusts,* 2nd Ed. 1947, Section 552, pp. 600-602.

Respondents' Brief in Opposition deliberately avoids mention or discussion of the fact that in *Altemeier* there was no genuine controversy, the will in question having been validated 40 years earlier and construed 25 years earlier in a decree affirmed by the Supreme Court of Illinois binding on all parties to the proposed settlement agreement.

Respondents' Brief in Opposition, p. 6, asserts that it is necessary to revert "parenthetically" to the Appellate Court decision to ascertain what it said that the Supreme Court of Illinois was in accord with." But when this is done it is abundantly clear that the Appellate Court decision was based upon the absence of a genuine controversy and not upon the presence of spendthrift provisions in a challenged trust. The Supreme Court of Illinois itself made this clear:

> "The Appellate Court decided the case principally upon the proposition of the failure of the appellants to establish that they come within the principles of

the family-settlement doctrine, and of *res judicata.* We think the Appellate Court was entirely correct in its finding that the proof failed to establish the right to a decree approving the family settlement, because of failure to prove those things that are required under the rule. In the first place, there must be a reasonable and substantial basis for the belief that a prolonged and extensive litigation will result over the distribution of the estate. In view of the fact that the will contest concluded with a decree binding all of the parties to the suit, and all persons claiming under them, in view of the decree construing the will, approved by the Supreme Court, and in view of the general principles set out herein regarding the termination of trusts, there could not be any reasonable ground that such litigation could be successful.

"Neither do we believe there was any doubt as to the construction of the will after the decision of this court rendered in *Smith* v. *Thomas,* 317 Ill. 150. In the *Uhlemann* case we said, among other things: "Undoubtedly, the members of a family are not privileged to alter the terms and provisions of a will merely for the convenience of the family or for the sole purpose of securing greater individual financial advantages than those specified in the will and intended by the testator. It seems quite clear that this is the underlying motive in the present case.

"We are fully in accord with the decision of the Appellate Court that the appellants have not brought themselves into a position where they can take advantage of the family-settlement doctrine; and are further of the opinion the Appellate Court was correct in the application of the *res judicata* effect of the former decree construing the will of Daniel C. Stover.

"In addition to the foregoing, we have announced the rules prohibiting the terminations of trusts where special considerations bring the case beyond the scope of the family-settlement doctrine." (403 Ill. 345, 356-357)

The requirements of a family-settlement are (a) a reasonable and substantial basis for the belief that a prolonged and extensive litigation will result over the distribution of the estate, and (b) substantial doubt with respect to the validity or construction of the challenged instrument. *Wolf* v. *Uhlemann,* 325 Ill. 165, 183; *Altemeier* v. *Harris,* 403 Ill. 345, 350-351, 356-357; *Tree* v. *Continental Illinois National Bank and Trust Co.,* 346 Ill. App. 509, 520; *Stein* v. *LaSalle National Bank,* 328 Ill. App. 3, 7. When these requirements are present spendthrift provisions do not bar the settlement. Thus, in *Wolf* v. *Uhlemann,* 325 Ill. 165, when these requirements were met, "there was no discussion of the power to terminate a spendthrift trust." Had there been no spendthrift trust involved in *Wolf* v. *Uhlemann,* 325 Ill. 165, the court in *Altemeier* v. *Harris,* 403 Ill. 345, 351 would have noted that fact but it simply noted that there was no discussion. The authorities cited in the Petition for Writ of Certiorari, p. 16, which respondents do not challenge, and *Hartley* v. *Heirs of Wyatt,* 281 Ill. 321, 324, which is cited in Respondents' Brief in Opposition at p. 7, show that *Wolf* actually did involve a spendthrift trust. The author of the opinion in *Wolf,* Mr. Justice Farmer, was the author of *Wallace* v. *Foxwell,* 250 Ill. 616, and *Wagner* v. *Wagner,* 244 Ill. 101. He certainly knew that the trust in *Wolf* was a spendthrift trust as did the court in *Altemeier* which cited *Bennett* v. *Bennett,* 217 Ill. 434, and *Wagner* v. *Wagner,* 244 Ill. 101 (403 Ill. 345, 352). See Petition for Rehearing, pp. 6-7.

When deviation from a trust instrument is permissible, spendthrift provisions in such trust instrument are no bar. That is why the Appellate Court of Illinois in *Thorne* v. *Continental Illinois National Bank and Trust Company,* 18 Ill. App. 2d, 163, said at p. 175:

> "We do not believe the fact that the trusts in question contained 'spendthrift clauses' * * * should limit a court of equity in its directing an invasion of the corpus, as no case cited, which permitted deviation from trust provisions, indicated that spendthrift clauses are to be considered in any different category than other trust provisions when permitting the deviation from the corpus restrictions."
>
> Likewise in *Quigley,* 1 T.C. 837, the court said:
>
> "The trusts certainly are no more impregnable than the will by which they were established."

Guttman v. *Schiller,* 39 Ill. App. 2d, 58, 187 N.E. 2d 315, involved an unsuccessful attempt to upset a family-settlement. The court said at p. 66:

> "Many cases are cited in support of the proposition that beneficiaries have no right to alter the terms of a trust. It would be more accurate to say that the cases hold that beneficiaries cannot modify or terminate a trust except under certain conditions. If the conditions are met the trust can be terminated."

The instant case does not involve the *termination* of a spendthrift trust; the spendthrift trust contemplated under the purported will of Oscar J. Breault has not yet been funded. App. 80. It has not yet become effective. If petitioners succeed in their will contest, the trust under Oscar Breault's purported will will never become effective.

The cases cited in the Petition for Writ of Certiorari at p. 20 are for the proposition that the circumstances of the execution of the purported will of Oscar J. Breault establish *prima facie* the charge of undue influence. They are cited to show that the controversy sought to be settled is bona fide. The genuineness of the controversy is also shown in the stipulation of facts. App. 74-80.

Once it is resolved here that the District Court indeed does have the jurisdiction or power to approve a family-settlement, the District Court can pass on any other objections which are thought to have merit including the genuineness of the controversy. However, the family-settlement doctrine does not require that the contestants in a will contest win the will contest before the family-settlement doctrine is applicable.

Respondents' Brief in Opposition urges, p. 7, that the family-settlement doctrine does not apply because "no family was *being* torn asunder in the case at bar. Years of bitter litigation while Oscar J. Breault was alive had taken care of that, *In Re Estate of Breault,* 29 Ill. 2d 165, 167, 193 N.E. 2d 824, 826." (Italics ours) Petitioners were 15 and 14 years old respectively when their father died and were never parties to any litigation until the will contest. Respondents' contention ignores the salutary efforts which the beneficially interested parties have made to save the estates of Kathryn Breault and Oscar Breault from depletion by further litigation. Surely an executor's duty to defend a will contest does not require him to advance spurious defenses and exhaust the estate.

II.

The decision below, misinterpreting Illinois law, unreasonably requires the beneficially interested parties (all of whom by now, by reason of what has transpired in the past six years, may well be convinced that there was, indeed, undue influence) to litigate to the bitter end, and for some of them, either to lose or to abdicate interests in the estates involved, to the advantage of the attorney charged with undue influence.

To hold that a federal court of equity may approve the settlement of a will contest except when the challenged in-

strument contains spendthrift provisions, unreasonably stresses the form of the challenged instrument. We submit that when a family-settlement to avoid prolonged and extensive litigation over a genuine controversy is permissible, it matters not what language may appear in the purported will.

To bar settlement by reason of the testator's supposed "intention" when that intention is the subject of the controversy begs the question.

Professor Bowe and Parker have put it this way:

> "As in the case of wills in general, it would seem undesirable to force the parties to litigate when they are ready to make mutual concessions at the outset and avoid litigation.
>
> "* * * While it may seem undesirable to permit the heirs, next of kin, devisees and legatees to ignore testator's will and to distribute his estate on a basis different from that which he has prescribed in his will it would seem to be an evil still greater to create a legal restriction under which the adversary parties cannot compromise their rights but in which they are given a choice only between litigation to establish their rights completely, and a total abandonment of their rights." Volume 2, p. on Wills, Bowe, Parker Rev. (1960) Section 25.5, p. 632.

In this diversity action the jurisdiction of this Court is invoked by reason of the failure of the courts below to apply the controlling decision of the highest State Court, whatever may have prompted this result. Although permitted by Rule 24, the brief of respondents, Feigenholtz, et al, in opposition, includes no objection to this Court's jurisdiction. It is suggested that the courts below permitted themselves to be misled by the spurious con-

tentions and the manner of argument of respondents, Feigenholtz, et al, as exemplified in their brief here.

Respectfully submitted,

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